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IN THE COURT OF APPEALS OF INDIANA

ERNEST D. JOHNSTON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 19A04-0608-CR-459
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DUBOIS CIRCUIT COURT
The Honorable William E. Weikert, Judge
Cause No. 19C01-0401-FB-2

May 14, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Ernest D. Johnston appeals from his conviction, after a jury trial, of sexual misconduct with a minor, a Class B felony. On appeal, Johnston challenges the trial court's decisions to exclude evidence of the victim's past sexual conduct and to admit into evidence his statements made to police. Johnston also challenges the sufficiency of the evidence supporting his conviction of sexual misconduct with a minor, a class B felony. Finding no error, we affirm.

Facts and Procedural History

On January 2, 2004, fifteen-year-old T.A. was staying with her friend, Cher Petry, at the house of Petry's father, Bill Petry, in St. Anthony in Dubois County. Also present were Tulsa Petry, and Brittany Schepers, Johnston, and Johnston's brother. Johnston was approximately twenty-eight years old at the time and knew that T.A. was fifteen years old.

Early in the morning of January 3, 2004, T.A. went to Cher's bedroom to sleep. T.A. was wearing shorts, underwear, and a t-shirt. Brittany, who was already in the bed, lay nearest to the wall, and T.A. lay in the middle of the bed next to her. A short time later, Johnston entered the bedroom and lay down next to T.A. on the outside edge of the bed. He began rubbing T.A.'s back. Johnston asked T.A. if that was "okay" and T.A. told him "yes." T.A. lay on her stomach while Johnston rubbed her back.

Johnston then moved his hands down to T.A.'s shorts and touched her. T.A. rolled over onto her side facing Brittany. Johnston pulled T.A.'s shorts and underwear aside and inserted his penis into T.A.'s vagina. Johnston moved his penis in and out of T.A.'s vagina a

couple of times, and then pulled his penis out of her vagina. While Johnston had his penis in her vagina, T.A. pinched Brittany to awaken her, and when Brittany responded, T.A. whispered to her "get him off of me." Tr. at 72. Brittany looked toward T.A. and Johnston, but did not observe anything happening. Brittany then rolled over facing away from T.A. and Johnston. T.A. rolled over onto her back. Johnston asked her if anything was wrong and T.A. responded "no."

T.A. got out of bed and went to the kitchen where Cher was using the computer. Cher observed T.A. crying, asked her what was wrong, and T.A. told her what had happened. Cher woke Brittany and then woke her father and told him that they had to take T.A. to the hospital. Bill Petry drove T.A., Cher, and Brittany to the hospital in Jasper.

At the hospital, T.A. told the doctor and nurse that she had been raped. The emergency room doctor and nurse examined T.A. and the nurse gathered physical specimens to complete a sexual assault kit.

Indiana State Police Detective Brad Cieslack responded to investigate T.A.'s allegations. Detective Cieslack spoke with T.A. and then drove to the Petry residence and asked to speak to Johnston in private. Detective Cieslack and Johnston sat in the patrol car, where Detective Cieslack read the waiver of rights to Johnston. Johnston acknowledged that he understood the waiver, signed the advice of rights and waiver form, and agreed to talk with Detective Cieslack. During questioning, Johnston admitted putting his penis into T.A.'s vagina, and said he knew it was wrong. Johnston agreed to go to the Indiana State Police Post in Jasper to give a recorded statement and agreed to permit the collection of physical

specimens from his body.

At the State Police Post, Detective Cieslack reminded Johnston of the rights and waiver form he had signed to ascertain if Johnston still wished to waive his rights and to give a recorded statement. Detective Cieslack then recorded a statement in which Johnston admitted having sexual intercourse with T.A.

Thereafter, Detective Cieslack read a consent to search advisement to Johnston, advising him of his rights. Johnston acknowledged that he understood his rights. Detective Cieslack read the waiver of rights to Johnston who acknowledged he understood and signed the waiver of rights form. Detective Cieslack then took physical specimens from Johnston's body, including a penile swab.

Detective Cieslack arrested Johnston, and Johnston was charged with sexual misconduct with a minor, a Class B felony. Prior to trial, Johnston filed a Notice of Intent to Present Evidence of Victim's Prior Sexual Activity, which the State opposed. After a hearing, the trial court denied Johnston's request to allow this evidence, and Johnston made an offer to prove. During the trial, Johnston objected to the admission of his statement admitting to sexual intercourse with T.A. and also to the evidence collected under the consent to search. The trial court overruled Johnston's objections and admitted the evidence.

The jury found Johnston guilty of sexual misconduct with a minor, a Class B felony. Finding there were no aggravating or mitigating circumstances, the trial court sentenced Johnston to the advisory term of ten years at the Department of Correction. Johnston directly appeals.

Discussion and Decision

I. Admission of Evidence

Johnston challenges the trial court's decisions to exclude evidence of T.A.'s past sexual conduct and to admit into evidence his statements made to police.

A. Standard of Review

The admission or exclusion of evidence is within the sound discretion of the trial court. Sallee v. State, 777 N.E.2d 1204, 1210 (Ind. Ct. App. 2002), trans. denied. The decision is afforded great deference on appeal and will not be reversed absent a showing of manifest abuse of the trial court's discretion resulting in the denial of a fair trial. Id.; Whiteside v. State, 853 N.E.2d 1021, 1025 (Ind. Ct. App. 2006). An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Sallee, 777 N.E.2d at 1210. In determining the admissibility of evidence, we will consider only the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. Burkes v. State, 842 N.E.2d 426, 429 (Ind. Ct. App. 2006), trans. denied. We look for substantial evidence of probative value to support the trial court's decision. Giles v. State, 760 N.E.2d 248, 249 (Ind. Ct. App. 2002).

B. Past Sexual Conduct Evidence

Johnston contends the trial court erred in excluding his proffered evidence of T.A.'s past sexual conduct. The evidence was excluded under Indiana Evidence Rule 412. Rule 412 provides, in pertinent part, "[I]n a prosecution for a sex crime, evidence of the past sexual conduct of a victim or witness may not be admitted…." Ind. Evidence Rule 412(a).

"Rule 412 is intended to prevent the victim from being put on trial, to protect the victim against surprise, harassment, and unnecessary invasion of privacy, and, importantly, to remove obstacles to reporting sex crimes." State v. Walton, 715 N.E.2d 824, 826 (Ind. 1999) (quoting Williams v. State, 681 N.E.2d 195, 200 (Ind. 1997)).

Rule 412 contains four specific exceptions that, Johnston agrees, do not apply in this case. However, Johnston urges this court to expand the exceptions to Rule 412 to include past sexual activity that is both relevant to the victim's credibility and supports the defendant's account of the incident.

Johnston sought to introduce evidence of T.A.'s past sexual conduct to impeach T.A.'s credibility and to support his account of the incident. Prior to trial, Johnston made an offer of proof concerning the evidence he sought to admit. He asserted that as he was sleeping in the bed, T.A attempted to have sex with him. Johnston proffered evidence from Brittany that T.A. had performed similarly with a former boyfriend, Steven Schepers. Brittany stated Steven, her cousin, had related to her that while he was intoxicated and passed out, T.A. either had sex or attempted to have sex with him. Tr. at 9. However, Steven denied having sex with T.A. and denied telling Brittany that T.A. had either attempted to have or had sex with him while he was asleep or passed out. Id. at 4. The trial court denied Johnston's motion, stating:

> …then as we approached the trial, [Johnston] comes up with a different version … another witness, Mr. Steven Schepers, who would testify that oddly enough the same thing [Johnston] is now saying happened to him happened to Steven Schepers. Now, the problem with all that is Steven Schepers twice under oath has denied that. So I think that ... is one of the reasons that the Rape Shield Law is available ... I think it is so convoluted … that to even think

> the jury should hear this … is not correct. The jury shouldn't hear this. The credibility is remarkably missing when everything is based upon an alleged event that occurred to Steven Schepers and Steven Schepers denies it happened. So, to allow [Johnston] to testify about what he says Steven Schepers told him will not be allowed. To allow Steven Schepers to testify about what he denies and other witnesses say he said happened to him will be not [sic] allowed and to allow Brittany Schepers to testify about any conversation she had with Steven Schepers about prior sexual activity on the part of the alleged victim will not be allowed. So, I don't see any relevance to any of this. It's all based upon allegations that someone had something happen to him, Steven Schepers, and he denies it ever happened to him so I don't know why this jury should ever, ever consider that. I think it's [sic] probative value is as close to zero as possible and the prejudicial value, I think, is … great and I think that's why we do have the Rape Shield Law to prevent events like this from happening.

Tr. at 20-21. Thus, the trial court excluded any evidence of T.A.'s past sexual conduct.

Johnston admits to having sexual contact with T.A. However, he denies having intercourse with T.A. and challenges her claim that penetration occurred. He argues that as there was no medical or scientific evidence corroborating her claim that penetration occurred, T.A.'s accurate statement that sexual contact occurred "bolstered" her credibility in her further statement that penetration occurred.

Johnston urges this court to apply Redding v. State, 844 N.E.2d 1067, 1069 (Ind. Ct. App. 2006), which discussed the risk of "partial corroboration." In Redding, the trial court's judgment was reversed on the finding that the defendant's Sixth Amendment right to cross-examine the witnesses was violated. In that case, after being convicted of child molesting, the defendant argued the trial court improperly excluded evidence of a prior molestation of the victim. 844 N.E.2d at 1068. This court held since the defendant should have been allowed to rebut the inference that he caused the child's injuries, he should have been

permitted to cross-examine the child regarding the prior molestation. Id. at 1071. The Redding court explained:

> In partial corroboration, once there is evidence that sexual contact did occur, the witness's credibility is automatically "bolstered." This bolstering evidence invites the inference that because the victim was accurate in stating that sexual contact occurred, the victim must be accurate in stating that the defendant was the perpetrator. Therefore, in such cases, the defendant must be allowed to rebut this inference by adducing evidence that another person was the perpetrator.
>
> In other words, the risk of partial corroboration arises when the State introduces evidence of the victim's physical or psychological condition to prove that sexual contact occurred and, by implication, that the defendant was the perpetrator. Once admitted, such evidence may be impeached by the introduction through cross-examination of specific evidence which supports a reasonable inference and tends to prove that the conduct of a perpetrator other than the defendant is responsible for the victim's condition which the State has placed at issue…. We emphasize that both the necessity for and the constitutional right to such cross-examination are limited to these specific and narrow circumstances and clearly do not permit a general inquiry into the victim's sexual past or allow the defendant to posit hypothetical perpetrators, an inquiry which would violate the Rape Shield Statute.

844 N.E.2d at 1070-71 (quoting Turney v. State, 759 N.E.2d 671, 676 (Ind. Ct. App. 2001).).

Johnston argues that to combat this "bolstering" and in order to allow his presentation of a complete defense, he must be allowed to rebut T.A.'s version by presenting evidence of his version. He further asserts the absence of any medical and scientific evidence of penetration actually supports his version of the incident. He asserts his proffered evidence directly supported his account of what happened, and should have been admitted as a prior similar act relevant to his intent.

However, this case is distinguishable from Redding. In Redding, the defendant denied any inappropriate contact with the victim. However, there was evidence that the victim

suffered a penetrating injury, and thus, an issue before the jury was how the injuries happened to a six-year-old girl. The defendant sought to introduce evidence of a prior molestation of the victim, to rebut the inference that he caused the child's injuries. This court determined defendant should be allowed to prove the injuries could have been caused by a prior molestation. Here, there is no question as to the identity of the perpetrator. Thus, this is not the type of inquiry contemplated by Redding.

Further, we disagree with Johnston's claims the trial court's ruling prohibited him from challenging T.A.'s credibility. We acknowledge that T.A.'s credibility was central to the case, as she was the only witness to say that the penetration occurred. However, the jury had the opportunity to determine T.A.'s credibility as it heard and observed her testimony, and her cross-examination by the defense. The jury also heard testimony regarding how T.A. behaved after the incident from other witnesses who were present at the Petry residence, who drove her to the hospital, and who examined her at the hospital. Further, the evidence of T.A.'s past sexual conduct with someone other than Johnston that Johnston sought to introduce was not credible in that Steven Schepers twice, under oath, denied that the sexual conduct occurred.

Johnston presents an interesting argument in support of his request to enlarge the exceptions to the prohibition against using the victim's prior sexual history. In this case, Johnston argues the victim's accounts are equivocal and there was no conclusive scientific evidence of sexual penetration. Thus, showing the victim's prior similar type of sexual conduct might tend to explain the lack of such evidence. However, the proffered evidence

was based on an alleged event that occurred to Steven Schepers and Steven Schepers twice, under oath, denied it happened. Therefore, we decline Johnston's invitation to expand the exceptions to Rule 412. The trial court did not err in excluding this evidence.

C. Johnston's Statements

Johnston challenges the admission of his incriminating statements on the basis of an inadequate waiver of rights. Johnston asserts the State did not prove he knowingly and intelligently waived his constitutional rights. Johnston argues Detective Cieslack failed to adequately advise him of his constitutional rights, and further, failed to insure that he understood those rights prior to waiving them. Johnston states Detective Cieslack should have clearly explained Johnston's constitutional rights, and then determined whether Johnston clearly understood them, pursuant to Dickerson v. State, 257 Ind. 562, 571, 276 N.E.2d 845, 850 (1972). Johnston further asserts he should have been informed that he would be signing a waiver of his rights and that he should sign it only if he desired to answer questions at that time without the presence or advice of an attorney. Id. Johnston complains the record fails to show that Detective Cieslack made any effort to determine Johnston's understanding of his rights. Thus, he argues, as the State failed to prove his waiver of rights was adequate, his statements should be suppressed.

In Dickerson, the court held that the waiver of the defendant's Miranda rights was invalid when the defendant was merely presented with a form stating his Miranda rights, and told to read it and then to sign it if he understood it. Id. at 850.

The present case is distinguishable from Dickerson. Detective Cieslack orally informed Johnston of his rights and asked Johnston if he understood those rights. Johnston replied that he did understand the rights. Further, Detective Cieslack orally informed Johnston of the waiver portion and Johnston also orally agreed to waive his rights and agreed to speak with the detective before he signed the waiver form.

A waiver of Miranda rights occurs when the defendant, after being advised of those rights and acknowledging that he understands them, proceeds to make a statement without taking advantage of those rights. Ringo v. State, 736 N.E.2d 1209, 1211-12 (Ind. 2000). As there is no formal requirement for how the State must meet its burden of advising an individual consistent with Miranda, this court examines the issue in light of the totality of the circumstances. State v. Keller, 845 N.E.2d 154, 161 (Ind. Ct. App. 2006).

Several means of sufficiently informing an individual of the Miranda rights are commonly employed by law enforcement, including: (1) a candid two-way discussion between law enforcement and the accused regarding these constitutional rights, (2) an oral recitation or reading of the rights to the accused followed by directly questioning whether the accused understands these rights, (3) provision of an advisement of rights form read aloud by the accused before it is signed, or (4) any combination of these. Id. at 162. Due to the various ways a person may be warned under Miranda, a claim that advisements were inadequate requires that the State prove the warnings were given with sufficient clarity. Id. A signed waiver form is one item of evidence showing that the accused was aware of and understood his rights. Allen v. State, 686 N.E.2d 760, 770 (Ind. 1997), cert. denied, 525 U.S.

1073, 119 S.Ct. 807, 142 L.Ed.2d 667 (1999). Even so, the State may be required to produce further evidence tending to show that a defendant understood and voluntarily waived his rights. Id.

In Keller, we held the State failed to establish that the defendant's waiver of his Miranda rights was knowing and intelligent. 845 N.E.2d at 164. The defendant was not orally advised of his rights, but was provided with a form and told to sign if he understood it. After the defendant reviewed the form and signed it, a law enforcement officer ascertained he was able to read and write prior to giving him the form and the defendant subsequently affirmed that he had read the form. However, the defendant did not affirm that he understood the document. Id. at 163. The court emphasized that an oral advisement is the preferred method of ensuring an accused's constitutional rights. Id.

In the instant case, Detective Cieslack orally read the rights form to Johnston. The detective asked Johnston if he understood the rights and Johnston answered that he did understand. The detective then provided an advisement of rights form, which Johnston signed. Regarding the interview with Johnston at the Petry home and Johnston's first incriminating statements, Detective Cieslack testified at trial that:

> We walked out to my car and … I told him that the reason I was there is that [T.A.] had made an allegation that… he had had sexual intercourse with her without her consent; and at that time I told him that I … didn't want to ask him anything until I read him his rights; and I … had the Miranda Rights Waiver Form; and I filled out the top portion and then I read the entire portion that applied to him … and asked him if he understood it. He said that he did and there's a portion on there that's a waiver. I read that to him and he agreed to … waive his rights and to speak to me and he signed that. I witnessed it with the date and time as well.

Tr. at 191. Detective Cieslack further testified:

> I read every word that applied to him … that's on the paper including the top Advice of Rights, Interrogation, the location, date. I read each one of these lines under "your rights". … I read him the waiver as you read it here word for word. Asked him if he understood it. … I actually asked him if he understood the rights as I said before and then I read him the Waiver and asked him if he would like to waive his rights to speak to me and he agreed and he signed and then I signed as a witness as well.
>
> Q. Now you say you asked him if he understood it. What ... what was his response?
>
> A. His ... response was that he did.

Tr. at 194-95. Thus, Johnston was properly advised of his Miranda rights.

Johnston complains that at that time, Detective Cieslack did not explicitly inform Johnston of the import of signing the waiver. In Keller, although the defendant made remarks indicating he understood his statements were self-incriminating, there was no indication he understood his right to have an attorney present or to stop answering questions at any time. Id. The court stated that law enforcement officers must clearly explain a person's constitutional rights and determine the accused's understanding of those rights prior to commencing an interrogation. Id.

Here, however, Detective Cieslack explained the situation to Johnston, read Johnston the rights and the waiver form, and then asked Johnston if he was willing to talk. Johnston stated he understood his rights and signed the waiver form. He then spoke with Detective Cieslack and gave an incriminating statement. Johnston then agreed to go with Detective Cieslack to the State Police Post in Jasper so his statement could be recorded. Detective Cieslack drove them to the Post. Johnston gave a second statement that was tape recorded, reiterating his first statement to Detective Cieslack admitting that he sexually molested T.A.

At trial, regarding the interview with Johnston at the State Police Post, Detective Cieslack testified that:

> Well, when we arrived at the Post…I…spoke to him again on tape about what happened. Before, we did, I…referenced the Miranda Waiver Form again and confirmed that he had…waived his rights under that and that he was going to speak to me and we did the…I basically asked him questions on tape about the incident and he responded.

Tr. at 198. The time between the initial advisement and the recorded statement was short. Johnston gave no indication he was unaware of his rights or that he waived those rights a short time before.

Here, the totality of the circumstances shows the State met its burden of establishing that Johnston understood his rights prior to waiving them. The evidence shows Johnston's statements were given voluntarily. Detective Cieslack did not engage in any coercive activity, violence, threats, or improper promises to obtain the incriminating statements, and Johnston does not allege any such coercive activity. Detective Cieslack read the rights to Johnston, asked Johnston if he understood the rights, and Johnston stated he did understand the rights. Thus, the State has shown Johnston voluntarily made a knowing and intelligent waiver of his rights.

Further, any error in the admission of Johnston's statements would not constitute grounds for reversal. Errors in the admission or exclusion of evidence are considered harmless unless they affect the substantial rights of a party. To determine whether an error in the admission of evidence affected a party's substantial rights, we assess the probable impact of the evidence on the jury. Burkes, 842 N.E.2d at 429. To determine if reversal is warranted when an error in the admission of evidence has been made, the reviewing court

looks at the probable impact of the evidence on the jury's decision. Schwestak v. State, 674 N.E.2d 962, 965 (Ind. 1996). Given that T.A. testified that Johnston inserted his penis in her vagina, there was sufficient evidence from which the jury could determine that Johnston was guilty of sexual misconduct with a minor, a Class B felony, and any error in admitting Johnston's statements was harmless.

II. Sufficiency of the Evidence

Johnston challenges the sufficiency of the evidence to support his conviction.

A. Standard of Review

When reviewing sufficiency of the evidence claims, we do not reweigh the evidence or assess the credibility of the witnesses. Rather, we look to the evidence and reasonable inferences drawn therefrom that support the verdict and will affirm the conviction if there is probative evidence from which a reasonable jury could have found the defendant guilty beyond a reasonable doubt. Sallee, 777 N.E.2d at 1208.

B. Evidence of Sexual Intercourse

Johnston contends that T.A.'s inconsistent accounts of the sexual contact with Johnston together with the lack of medical or scientific evidence preclude a finding that sexual penetration occurred. Johnston argues the evidence is insufficient to prove sexual intercourse.

To sustain Johnston's conviction for sexual misconduct with T.A., the State needed to prove that Johnston 1) performed sexual intercourse; 2) with T.A.; 3) when Johnston was at least eighteen years of age; and 4) when T.A. was at least fourteen years of age, but less then sixteen years of age. Ind. Code § 35-42-4-9(a).[1]

Johnston asserts T.A.'s accounts of the details of the incident were inconsistent. He points to her testimony that when Johnston was rubbing her back, T.A. did not tell him no or ask him to move away. She also testified Johnston did not hold or grab her and did not physically force her. However, the emergency room nurse testified that T.A. told her that Johnston covered her mouth with his hand, moved her clothes aside, told her to be quiet, turned her onto her back, and raped her. The nurse also testified T.A. told her that T.A. orally told Johnston no. Johnston also emphasizes that T.A. testified that she told Cher what had happened before leaving for the hospital and Cher told her father. However, Cher's father did not know about the sexual allegation until he was at the hospital, and left another daughter home alone with Johnston and Johnston's brother when he took T.A. to the hospital. Johnston also challenges T.A.'s testimony regarding evidence of penetration. He states that T.A. was merely responding to a question and did not know what the word "penetrate" meant. T.A. used the term "intercoursed." Tr. at 92, 93. Johnston argues it is unreasonable for the jury to conclude that "intercoursed" means penetration. Johnston urges this court to follow Spurlock v. State, 675 N.E.2d 312 (Ind. 1996). In that case, although the victim said the defendant touched her vagina with his penis, the court found no evidence of penetration

[1]The offense is a Class B felony because Johnston was at least twenty-one years of age. Ind. Code §

in that the description of the act was not clear and precise. The victim "demonstrate[ed] only a generalized understanding of the term [vagina,]" and there was no external or medical evidence of penetration. Id. at 315.

Here, however, the evidence presented at trial established that T.A. was fifteen years old at the time of the crime and that Johnston, who was approximately twenty-eight years old, knew her age. T.A. testified that Johnston inserted his penis inside her vagina, pushed it in and out of her vagina, and then withdrew it. Detective Cieslack testified Johnston stated that he put his penis in T.A.'s vagina and pushed it in and out. The detective testified that Johnston stated he stopped because he knew T.A. was too young and what he was doing was wrong. Further, the State presented evidence of a penile swab taken from Johnston within hours of the crime that showed DNA identifiers consistent with T.A.

T.A. testified that Johnston inserted his penis into her vagina. Testimony from the victim alone is sufficient to sustain a conviction. Carter v. State, 754 N.E.2d 877, 880 (Ind. 2001), cert. denied, 537 U.S. 831, 123 S.Ct. 135, 154 L.Ed.2d 47 (2002); Warren v. State, 701 N.E.2d 902, 906 (Ind. Ct. App. 1998), trans. denied. Further, a conviction may stand on the uncorroborated evidence of a minor witness. Warren, 701 N.E.2d at 906.

Johnston's argument is merely an invitation for this court to reweigh the evidence. However, the State presented sufficient evidence from which a jury could conclude that Johnston was guilty beyond a reasonable doubt.

Conclusion

35-42-4-9(a)(1).

We hold that the trial court properly excluded evidence of T.A.'s past sexual conduct, and properly admitted Johnston's statements made to police. Further, we hold that sufficient evidence supports Johnston's conviction of sexual misconduct with a minor, a Class B felony. Accordingly, we affirm**.**

Affirmed.

BAKER, C.J., and DARDEN, J., concur.